

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Vonage Holdings Corporation)	WC Docket No. 03-211
Petition for Declaratory Ruling)	

Comments of TCA

I. Introduction and Summary

TCA, Inc. - Telcom Consulting Associates (“TCA”) hereby submits these comments in response to the Public Notice¹ issued in the above-captioned proceeding. Vonage Holdings Corporation (Vonage) filed a Petition for Declaratory Ruling (Petition) with the Commission on September 22, 2003 requesting preemption of certain findings made by the Minnesota Public Utilities Commission (MPUC). The MPUC’s findings relate to the regulatory classification of Vonage’s service, which utilizes a Voice over Internet Protocol (VoIP) technology to deliver voice communications services.

TCA is a consulting firm that performs financial, regulatory, management, and marketing services for over seventy small, rural local exchange carriers (LEC) throughout the United States. TCA’s clients are rate-of-return regulated rural local exchange carriers (RLECs) and therefore will be directly impacted by the FCC’s actions in this proceeding. These comments address the concerns of TCA’s clients.

TCA concludes that, while the ultimate regulatory treatment of VoIP-based services cannot be determined in this proceeding alone, the Commission has no choice but to deny Vonage’s Petition and define its VoIP-based local voice service as a telecommunications service. At the core of Vonage’s request is a critical issue the Commission, and states across the country, will eventually have to address – whether regulation should evolve and consider not the technology used to provide service, but instead the nature of the service itself. TCA submits that regulation must consider the nature of the service, which, in this case, it is clear that Vonage’s service is intended as a replacement for traditional, circuit-switched, voice telecommunications

¹ Public Notice, DA 03-2952, released September 26, 2003 (“Public Notice”).

services. As a result, the Commission should find that Vonage provides a telecommunications service, which should carry with it all the privileges and responsibilities of all other voice telecommunications services, at this time. In addition, the Commission should initiate a generic proceeding to investigate the future regulatory regime that will be applied to VoIP-based local services.

TCA is aware of the permanent injunction granted by the United States District Court, District of Minnesota regarding the MPUC's finding that Vonage provides a telecommunications service². In addition, and as a result of the Court's injunction, the MPUC issued an order staying compliance of its findings regarding Vonage's service³. As a result, it appears that the relief sought by Vonage from the FCC has largely been provided by the Court and MPUC. However, TCA believes this issue to be of adequate import so as to provide the Commission with these comments. In addition, as the Commission is aware, several other states have explicitly addressed VoIP-based services, and the results of regulatory regime application is far from consistent. This provides the Commission with additional reason to address issues brought up by Vonage's petition, and start down what is likely to be a long and complicated path in deciding how to apply regulatory principles to VoIP-based services and providers.

II. Vonage's Service is Properly Classified as a Telecommunications Service.

Vonage bases its Petition on the argument that the VoIP-based voice communications service it provides, by virtue of utilizing the ubiquitous Internet, is an information service and thus not subject to common carrier regulation under Title II of the Act. While TCA recognizes the unique nature of Vonage's service, and that a service of this type does not fit neatly under any current regulatory regime, the fact remains that Vonage presents its service as a replacement for traditional voice telephony services such as provided by rural local exchange carriers (RLEC). As stated in the Minnesota Department of Commerce's Complaint to the MPUC, Vonage advertises its service as "...an all-inclusive phone service that replaces your current phone company."⁴ In addition, a review of Vonage's website shows that its "Digital Voice" service offers features normally associated with other voice telephony service, such as call

² See Memorandum Opinion and Order, Civil No. 03-5287, dated October 16, 2003, United States District Court, District of Minnesota.

³ *Order Staying Order of September 11, 2003* in Minnesota PUC Docket No. P-6214/C-03-108

waiting, caller ID, three-way calling, and long distance calling packages. In summary, Vonage has gone to great lengths to ensure its service appears as close as possible to traditional voice telephony services to its customers, including the generation of a “dial tone”⁵.

At the core of Vonage’s claim that its voice telephony service is an information service, instead of a telecommunications service, is the argument that Vonage causes a net protocol conversion. Vonage argues that since its service “converts the asynchronous IP packets generated by the customer’s computer equipment into the synchronous TDM format used by the telephone network (and vice versa)”⁶, it is properly classified as an information service. However, the fact remains that a Vonage customer transmits voice signals, the format of which is irrelevant to the customer or to this proceeding, and that Vonage does not effectuate a change in the voice signal – the customer expects that what is said into a telecommunications device⁷ used to access Vonage’s services is what will be heard by the recipient party. The FCC has previously addressed this type of “no net” protocol conversion, and found that certain categories of protocol processing services are treated as basic, or telecommunications, services⁸:

1. Protocol processing involving communications between an end-user and the network itself (e.g., for initiation, routing, and termination of calls) rather than between or among users;
2. Protocol processing in connection with the introduction of a new basic network technology (which requires protocol conversion to maintain compatibility with existing CPE); and
3. Protocol processing involving internetworking (conversions taking place solely within the carrier’s network to facilitate provision of a basic network service, that result in no net conversion to the end-user)

The Commission could plainly classify Vonage’s protocol processing under one of the definitions listed above, and thus consider Vonage’s service a telecommunications service. Indeed, Vonage’s supposed protocol conversion is nothing more than what is done by incumbent LECs today that employ digital switching – a fact Vonage recognizes in its petition⁹.

⁴ Vonage Petition, Exhibit 2, page 4

⁵ See Vonage’s website at www.vonage.com/learn_need.php - “You pick up the phone, hear the dial tone, and dial the telephone number of your choice.”

⁶ Petition at page 12

⁷ In fact, Vonage customers can utilize conventional analog telephone sets to access Vonage’s service (Petition, p.5).

⁸ *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket 96-149, First Report and Order and Further Notice of Proposed Rulemaking, FCC 96-489 (rel. Dec. 24, 1996), paragraph 106.

⁹ Petition, page 7, footnote 13

Vonage states that its service can be accessed by using any type of broadband, high-speed, Internet connection provided by a third party telecommunications carrier, satellite or cable company¹⁰. Considering Vonage claims its voice telephony service is an unregulated information service, even over wireline broadband connections, it would logically follow that VoIP-based local telephone service provided over any medium would be completely deregulated. The ultimate outcome of this deregulatory theory would be that VoIP-based voice telephony services, based upon a choice made by service providers, would not fall under any regulatory regime. As discussed below, this end result would not be in the public interest. In addition, at least one IP telephony provider determined it would be prudent to file for a certificate of convenience and authority to provide local service in competition with an incumbent carrier¹¹. This application demonstrates that VoIP-based voice telephony service and the application of certain regulatory requirements are not mutually exclusive.

III. Vonage Does Not Pay the Federal USF Assessment or Access Charges

Contrary to statements Vonage made in *ex parte* presentations to the Commission¹², Vonage does not pay an assessment on its interstate retail end user revenues to support federal universal service mechanisms¹³. Instead, Vonage pays an assessment as any other end user would – the charge assessed by Vonage’s local telecommunications provider. In addition, Vonage does not pay access charges to local carriers to compensate for the use of the local networks for terminating long distance calls. These two issues, the lack of participation in and/or compliance with national intercarrier compensation and universal service contribution programs and rules, present the most concerning problems with Vonage and other VoIP-based service providers.

As established above, Vonage provides telecommunications services, and charges its customers for those services. Vonage offers various service packages, all of which include local calling and long distance calling for a flat rate (with overage charges for long distance usage over

¹⁰ Petition, page 4

¹¹ *In the Matter of the Application of Time Warner Cable Information Services (Kansas) LLC for a Certificate of Convenience and Authority to Provide Local Voice Service within the State of Kansas*, Kansas Corporation Commission Docket No. 04-TWRT-224-COC: “The Applicant intends to provide facilities-based local Internet Protocol voice service, targeted to the residential market.” (Exhibit A)

¹² See October 10, 2003 Notice of *Ex Parte* Meeting

¹³ 47 C.F.R. § 54.706: *Entities that provide interstate telecommunications to the public...for a fee will be considered telecommunications carriers providing interstate telecommunications services and must contribute to the universal service support programs.*

the package amount of usage)¹⁴. When Vonage uses an incumbent local exchange carrier's digital subscriber line (DSL) service to provide its voice telephony product to an end-user, the incumbent's federal USF assessable revenues¹⁵ are not impacted, but other revenues, some of which do impact federal USF assessable revenues, are affected. While Vonage claims it can not determine the jurisdictional nature of the services it provides, there can be no question that Vonage's service is replacing long distance revenue, some of which is interstate and assessable for federal USF purposes. As a result, Vonage is yet another cause of the decline in the federal USF mechanism's revenue base, and yet Vonage does not contribute any amount based on its end user revenues.

Vonage's Petition provides the Commission with ample evidence that, if any regulatory regime is to be placed upon its service, then the regulation should be of an interstate nature¹⁶. TCA, as discussed further below, recognizes that the nature of Vonage's voice telephony service may not lend itself to traditional shared interstate/state regulatory regimes. As a result, the Commission could easily find that all, or at least a substantial portion, of Vonage's end user revenues are interstate in nature and thus assessable for federal USF purposes.

Vonage also claims it pays access charges, as an end user¹⁷. According to its Petition, Vonage purchases local telephone service and interexchange service to terminate traffic to the public switched telephone network (PSTN)¹⁸. It is not clear in what context Vonage uses the term "access", and it is further unclear whether Vonage pays access charges to local exchange carrier for terminating its customers' calls on LEC networks. It is clear, however, that Vonage does not pay for access to LEC local networks when it uses the established broadband connection to provision voice telephony services to its customers. This "free ride" on LEC facilities in is contradiction to the goals of the federal Act, and provides for unfair competition with other providers that pay for LEC network access.

This unwillingness to participate in established intercarrier compensation and universal service fund assessment programs causes Vonage's, and other providers', VoIP-based local telephony service to be a direct threat to this nation's universal service policies. In addition,

¹⁴ See www.vonage.com – Unlimited local and regional calling, plus 500 long distance minutes, for \$24.99.

¹⁵ Rural incumbent LECs' federal USF assessable revenues are generally limited, at this time, to revenues derived from the federal subscriber line charge (SLC). In order for rural LEC customers to receive DSL service, the customer must purchase basic local service from the rural LEC; thus, local revenues (including the SLC) are not impacted.

¹⁶ *Petition*, Section IV (starting on page 27)

¹⁷ See October 10, 2003 *Ex Parte* notice

Vonage's service threatens the continued deployment of broadband facilities to all areas of the United States. Vonage is able to compete, not based solely on the merits of its service, but because of the fees it avoids by cloaking its service under the broad umbrella of "information service." It is clear that the Commission, at least in the interim, should treat Vonage as any other provider of telecommunications service and ensure Vonage participates in the national programs that have ensured this country's first class communications network.

IV. Regulation of VoIP-Based Services

TCA recognizes the unique nature of Vonage's VoIP-based voice telephony service, and that it may not fit neatly under any current regulatory regime. However, this should not keep the Commission from addressing the most glaring inconsistencies caused by Vonage's use of the "information service" argument. The problems caused by VoIP-based voice telephony services are not unique to Vonage, and the impacts to this nation's universal service policies are just beginning. Therefore, the Commission must decide how it will treat VoIP-based services in the long run. TCA recommends the Commission adopt a two phase process, where the most immediate threats presented by VoIP-based services are addressed as soon as possible, and then a new regulatory framework can be developed.

First, it must be recognized that Vonage is providing local voice telephony service, and is not providing an information service. If Vonage were allowed to continue hiding under the "information service" cloak, the best interest of consumers would not be met – some level of regulation must be placed in Vonage's service. TCA does not suggest that other Internet-based communications services, such as electronic mail, instant messaging, and downloading MP3 files should be treated in the same fashion. The key fact to consider is the service, with the technology used to deliver the service being a secondary consideration. In this case, the customer would view Vonage's service as a replacement for their circuit-switched local service, especially in cases where the customer is able to discontinue receiving ILEC-provided local service, such as when the broadband connection is provided by the cable company.

Once the Commission finds that Vonage provides a telecommunications service, the type of regulatory regime, if any, to apply must be determined. TCA believes that no matter what the long term goal is for regulating VoIP-based services, some type regulation must be adopted for

¹⁸ *Petition*, page 7

Vonage's service. As is established above, Vonage's self-appointed status as an information services provider presents tangible adverse consequences to national universal service and advanced service policies. If Vonage is allowed to operate as a completely unregulated local voice service provider, the issue of consumer protection must also be considered. Vonage does not adopt or comply with standard rules of practice and procedure – standards that all other local service providers are required to follow. For example, some of Vonage's terms of service may not comply with state and/or federal rules, and may come as a surprise to customers who have been served by a fully regulated local exchange carrier: 1) Vonage reserves the right to terminate service at Vonage's discretion, for any reason, and at any time; 2) Vonage does not provide true E911 service; 3) all charges, including disputed charges, must be paid on the due date; and 4) Vonage is free to include whatever charges, and descriptions of those charges, on its bill that it pleases¹⁹. TCA is not suggesting full economic regulation for Vonage's service, but it is clear that some amount of consumer-oriented regulation must be adopted for Vonage and other providers of VoIP-based telephony services.

The long term solution for applying a regulatory regime to VoIP-based voice telephony services will force the Commission, and other industry stakeholders, to perhaps rethink the way telecommunications, as a whole, is regulated today. While the Commission should not embark on this journey today in this proceeding, decisions made regarding Vonage's Petition will undoubtedly set the stage for the next step in the process. TCA recommends that the Commission consider applying regulation to Vonage's, and other VoIP-based, services that is similar in function with that applied to competitive local exchange carriers (CLECs). In most states, CLECs are required to file and maintain tariffs, comply with standards of practice and procedure, follow billing and collection guidelines, and are subject consumer complaint processes adopted by the state commissions. CLECs are in no way, shape, or form regulated from an economic prospective, and neither should VoIP-based voice telephony providers. By adopting this type of transitional regulatory regime for Vonage and similar service providers, the Commission would begin "leveling the playing field" between incumbent and competitive carriers.

¹⁹ For example, see Vonage's website at http://www.vonage.com/learn_center.php, under the discussion item: "**What is the Regulatory Recovery Fee?**" "The Regulatory Recovery Fee is \$1.50 per phone number. This is a fee that Vonage charges its customers to recover required costs of Federal and State Universal Service Funds as well as other related fees and surcharges." (*This statement is inaccurate considering Vonage does not pay a federal USF assessment based upon its interstate end user revenues.*)

V. Conclusion

TCA does not envy the Commission its duties in determining the proper regulatory regime for VoIP-based services. The only thing that is clear is that current regulatory regimes do not perfectly fit the type of service Vonage provides. However, due to the threats that VoIP-based services present to national universal and advanced service policies, the Commission must adopt some type of regulation for Vonage's service immediately. TCA believes the Commission has the necessary tools and authority to implement 1) CLEC-style regulation, with an emphasis on consumer protection and service quality, on VoIP-based voice telephony service, 2) require Vonage, and similarly-situated carriers, to contribute, based on their own end-user revenues, to the federal USF, and 3) ensure VoIP-based services are not provided "free rides" on the networks owned and operated by incumbent and competitive local exchange carriers.

TCA recommends, based on the above discussion, that the Commission deny Vonage's petition as to the classifying its service as an "information service", and grant Vonage's petition as to the proper jurisdiction in which to regulate VoIP-based services (interstate). TCA further urges the Commission to open a separate, generic, proceeding to investigate the proper transitional and long-term regulatory regimes to apply to VoIP-based services.

Respectfully submitted,

[electronically filed]
TCA, Inc.-Telcom Consulting Associates
1465 Kelly Johnson Blvd., Suite 200
Colorado Springs, CO 80920
(719) 266-4334

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